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April 23, 1996

Via fax and mail - (202) 305-0506

Susan V. Cook
U.S. Department of Justice
P.O. Box 663
Washington, D.C. 20044

Re: Steele v. U.S.A.

Dear Susan:

We have received and reviewed your offer of judgment. To the extent that it makes an offer of settlement on the temporary taking claim for $70,000.00, the offer is rejected. In response, and in light of the fact that you indicated that you had no desire to negotiate a settlement on the case, we have prepared a final counteroffer. This offer will not be negotiated and is the final offer of settlement that the plaintiffs will make regarding the temporary taking claim. The plaintiffs will settle for $400,000.00.

The offer is simple to explain. It is based upon a royalty of $100,000.00 for four years. This offer ignores interest, to which we are entitled. It also ignores, damages for an additional two years of unreasonable Forest Service activity that continues to accrue, additional amounts for when the plaintiffs became partners, and any amount for Mr. Dansie. The offer also does not factor in costs. We believe that each of the aforementioned measures of damages can be proven at trial and that the actual damages with interest for a temporary taking are far above our opening offer.

In our letter of April 19, 1996 we asked for a detailed factual and legal basis for refusing to grant a permit to the plaintiffs where one was promised more than one year ago in the Forest Service Record of Decision. This legal explanation has not been forthcoming by telephone or in your letter of April 22, 1996. However, in a telephone conversation on Monday, April 22, 1996, you indicated that it was our responsibility to tell the Forest Service what "reasonable restrictions" would be for our own permit. You further indicated that asking the Forest Service to rely upon the express, written law was insufficient for the Forest Service to issue the permit. We continue to demand the legal basis for this position. You promised a permit and have not granted it. This is simply not legal and is prohibited by the United States Constitution and federal law.

Your April 22. 1996 letter also claims that "to date [we] have declined to sit down and fully discuss with the Forest Service the various necessary mitigating conditions which would accompany the permit." This is completely false. Since the ROD was issued we have had two face-to-face meetings with the Forest Service. The first lasted approximately ten minutes including formalities. The Forest Service was asked if it would do anything regarding the road to allow us to mine in a viable fashion. The Forest Service indicated that nothing would be done. Our second meeting occurred in September, 1995. At this meeting, the Forest Service again indicated that nothing would be done about the road. The Forest Service also agreed to specifically indicate which restrictions were greater than the State law requirements. A fax copy of the proposed conditions arrived more than six months later in March, 1996. You admitted to Troy Fitzgerald in a telephone conversation that the conditions were not completely clear and that it had been extremely difficult to get even this information out of the Forest Service.

Your April 22, 1994 letter also indicates the conditions are an area of confusion. They are. Forest Service documents have repeatedly contradicted themselves, and they do so again. Your letter asks how many tons would be taken out of the site annually. The original documents filed with the state indicate 100,000 tons would be removed annually. This was confirmed in several letters to the Forest Service including one dated December 21, 1994 to Mr. Tidwell wherein the State indicates "the original Plan of Operations filed for this project did propose 100,000 tons/year mine production figure. However, "the Division's small mining operation rules do not require disclosure of projected annual production as part of the application/permitting process." More importantly, the FEIS states the operation would remove "100,000 tons of ore annually." Mr. Steele has also confirmed this in his deposition.

Your letter indicates that "Mr. Steele needs to either comply with the conditions in the Record of Decision (ROD), or demonstrate why those conditions are unreasonable when applied to his operation." Yes, we are confused. The record of decision sets forth close to thirty binding restrictions. An appeal was made because this holding violated law. The appeal officer concurred and modified the ROD to make the mitigation measures non-binding. Additionally, he indicated that the Forest Service could negotiate with Mr. Steele, not the other way around. We have

repeatedly asked the Forest Service to clarify their position without any success. We have received letter after letter saying the conditions match state requirements. If so, issue the permit. Later, we received letters saying that the conditions are greater than state requirements. Still later, we receive letters saying the conditions are the same as state requirements, but the Forest Service needs additional information. In March, we receive a different set of requirements from the Forest Service. For a final time, we plead for a legal basis for withholding the permit. Your ROD grants us a permit. Your Appeal decision indicates a permit will be forthcoming and that the Forest Service will ask us to choose different approaches to mining if we are unreasonably harming your surface. Please abide by the Forest Service decisions and clear the confusion.

As you have demanded a more detailed description of what the plaintiffs will agree to, we will provide it herein. Again, the road is the initial issue. The following paragraphs will detail the restrictions demanded by the Forest Service and the plaintiffs position on each restriction. The positions taken by the plaintiffs are identical to the position taken during at least two face-to-face meetings with Forest Service personnel over the past year. In reviewing these conditions please keep in mind that it has taken six years to accomplish what plaintiffs legally belive should have taken a matter of days. For better or worse, plaintiffs are concerned about leaving matters in the hands of the Forest Service by agreeing to give the Forest Service discretion to stop or delay the project in any manner.

1. **Access to the patented mining claims.** Plaintiffs are willing to accept a 200 foot right-of-way as is customary in all such wilderness areas for high standard mining roads. Plaintiffs are also willing to accept a 24 foot road running surface with adequate space for shoulders, turns and ditches. The running surface area is directly attributable to allowing mine trucks to pass safely and applicable federal regulations. The trucks that will most probably be used by the plaintiffs initially are 10' 6" wide. Furthermore, plaintiffs insist that the area attributed to the road surface is not to be included in the actual mine area. Plaintiffs firmly believe that this is a public road and that it should not be included in the mine area. However, in compromise, the plaintiffs would agree to reclaim the road after mining ceases if the road area is not calculated in their mine area and if no intervening litigation declares that the Gardner Canyon road is public.

The larger right of way is necessary to accommodate the possibility of increased mining activity and the potential for larger vehicles accessing the property. In addition, the standard right-of-way would diminish the scrutiny placed upon the plaintiffs by wilderness and other environmental groups. The running surface is basically the same as has been demanded at all times by the plaintiffs. It would be unreasonable and not economically viable to operate on a smaller running surface. In addition, a right-of-way of only a few feet would make operations simply impossible. Every time a rock from the road fell outside of the plaintiff's twelve foot right-of-way plaintiffs stand in jeopardy of being shut down by the Forest Service or other interested groups. This is

unreasonable and unacceptable. A twelve foot right-of-way and road will not allow efficient use of equipment and will destroy the viability of the mine.

2. **Annual Plan of Operations including an updated reclamation plan.** Plaintiffs are willing to submit an annual plan of operations to the Forest Service, so long as the Forest Service remedy for failure to file is an action to enjoin the plaintiffs from mining until a plan is filed. Plaintiffs claim that it is unreasonable to be required to update the reclamation plan at the whim of the Forest Service or to have mining promptly stopped if the Forest Service unilaterally believes that the plan of operations is insufficient. Plaintiffs would be willing to update their reclamation plan if, and when, and large mining plan if submitted to the state for Gardner Canyon. If the plaintiffs continue to use Gardner Canyon as stated in their original permit application and original plan of operations, there is no need to change the reclamation plan that has been approved by the state and reviewed in the EIS process.

3. **All construction and mining operations are to be conducted according to State air quality standards.** The plaintiffs will accept this requirement so long as determination of air quality standards and whether a breach of those standards occurred is handled by the State personnel and not the Forest Service.

4. **Dust abatement procedures.** The Forest Service currently indicates that water will be a sufficient dust suppressant. However, the Forest Service further indicates that an "approved dust suppressant must be applied." The plaintiffs will agree to apply water, and only water, to the mine sites and roads. Additionally, the Forest Service must agree that the suppressant will not change from water to any other substance. Other currently approved Forest Service dust suppressants will actually harm the gypsum. The plaintiffs believe that it is unreasonable for the Forest Service to have the ability to stop mining by requiring any suppressant other than water due to the cost of the material and damage to the ore.

5. **Height of pit walls.** Plaintiffs have not requested a variance regarding pit wall height from the State of Utah. Therefore, plaintiffs agree to be bound by State and Federal regulations on pit wall height. Plaintiffs believe that it is unreasonable for the Forest Service to have authority to unilaterally change the bond amount upon their own subjective determination. Plaintiffs would allow the Forest Service to negotiate a change in the pit wall height if the plaintiffs request a variance which would enable them to increase the pit wall sizes beyond those described in the applicable regulations. On the same basis, plaintiffs object to the requirement to provide "specific data" in the plan of operations. Again, the Forest Service could unilaterally shut down operations based upon a subjective determination that the pit walls are "too high."

6. **Visual impacts and cut slopes.** Plaintiffs believe that they have already made every effort to minimize the visual impacts and disturbances at the mine. The plaintiffs have agreed to

employ a method of mining that is environmentally sound and creates a minimum of disturbance. Plaintiffs have also applied for a small mine permit which keeps the disturbances at less than 5 acres. Plaintiffs believe that it is unreasonable to allow the Forest Service to review plans and "select . . alternatives." Plaintiffs agree that keeping reclamation to a minimum is a positive for them, however, allowing the Forest Service to determine what is a "major adverse consequence" to the plaintiffs is simply unreasonable. The plaintiffs have the superior rights in this instance.

Plaintiffs agree to minimize cut slopes and disturbed areas in order to maintain small mine status. Plaintiffs propose to allow the Forest Service to notify them in writing of any situations where the Forest Service believes that operations do not minimize cut slopes, visual impacts and disturbed area. If the plaintiffs fail to act or respond to written notice, the Forest Service remedy should by to sue for an injunction.

7. **Surface Drainage.** The requirements set forth by the Forest Service in paragraph 6 of its recent Proposed Conditions is unreasonable. According to the requirement, the Forest Service will have almost daily interaction with mining operations. In addition, the cost of determining slope, soil types, etc. at the site along with the delay while the Forest Service makes decisions is simply unreasonable.

Plaintiffs agree to allow the Forest Service to make a one-time suggestion as to where and what type of surface drainage controls it would like at the mine site. The plaintiffs will evaluate and implement the controls it deems necessary to meet all Federal and State standards for water quality. The plaintiffs will also meet the State requirements for drainage controls. Plaintiffs will not allow the Forest Service to regularly demand new, different and expensive drainage controls to be put in place at their fancy.

8. **Surface Water Quality Monitoring.** The Forest Service has demanded that the plaintiffs propose and implement a monitoring plan for surface water. This requirement is ambiguous and unreasonable. A call to any testing laboratory would indicate that more than a dozen standard tests could be run on surface water with costs varying from six dollars to $550.00 per test. Plaintiffs agree to have surface water tested one time per month of operations for oil and grease and pH levels. This test alone will cost the plaintiffs approximately $50.00 per test. Plaintiffs would hold the test results for a period of three years and the results for the previous year would be submitted to the Forest Service with the yearly plan of operations.

Plaintiffs believe that it would be unreasonable for the Forest Service to require testing on a more frequent basis or any additional tests. Plaintiffs are not required to conduct any testing on the surface water adjacent to the Salt Creek Mine in Nephi, nor is there any water testing in Levan. Plaintiffs believe that $50.00 per month for water testing is reasonable. A single complete test for many common substances would be in excess of $875.00 and is not reasonable.

9. **Adequate provisions to protect existing water rights.** Plaintiffs have every intention to protect the Gardner Canyon Irrigation Company's rights to water in the Gardner Canyon area. As the surface owner, the Forest Service has no interest in the Gardner Canyon Irrigation Company. Plaintiffs believe it is reasonable to discuss water supply protection measures with the Irrigation Company, not the surface owner. Plaintiffs believe that it is unreasonable for the Forest Service to require surveys, coordination measures, relocation of stockpile materials, and restricted high wall height to protect an interest that is not their own. Plaintiffs further believe that it is unnecessary and unreasonable to require "reclamation surety" for an event that has no effect on the Forest Service or its surface rights and has not happened.

Plaintiffs agree to deal with the Irrigation Company regarding their property interest and the Forest Service regarding their property interest. Plaintiffs further agree to protect against erosion and surface run off as described in paragraph 7 herein.

10. **No Net Loss of Wetlands.** Plaintiffs agree to this restriction so long as the determination with regards to loss of wetlands is made by the United States Corps of Engineers.

11. **Storage of Hazardous Materials.** Plaintiffs state that it is unreasonable to require "a hazardous material contingency plan" that would be "implemented and enforced." Plaintiffs agree to store petroleum products and chemicals in durable or impermeable containers. Preparation, implementation and enforcement of a contingency plan would be extremely costly. Such a plan would require the hiring of an environmental engineer or similarly qualified employee to develop, and implement the plan. The extreme cost for such a "plan" is clearly unreasonable when the proposed operations would have few, if any, chemicals stored at the site. In addition, petroleum products, if stored at the site, would not be in sufficient quantity to affect "public safety."

12. **Removal of Petroleum Products.** A reclamation plan has already been approved by the State of Utah. Plaintiffs agree that it is reasonable to remove and dispose of petroleum products as required by State and Federal regulations. There should be no reclamation required beyond those stated in State and Federal regulations. If, at the time of reclamation, the Forest Service finds, through approved testing methods, that there is contamination in excess of Federal or State guidelines, the plaintiffs would agree to reclaim any contaminated surface.

13. **Site of Service Areas.** Plaintiffs agree to locate equipment service areas at least 100 feet away from streams in the area. However, plaintiffs want to be absolutely clear with the Forest Service. There is a pipeline in Gardner Canyon. Plaintiffs do not consider the Irrigation Company Pipeline to be a "stream."

14. **Cleanliness.** Plaintiffs agree to keep the work site as clean as possible. Again, the remedy for any subjective failure here would be for the Forest Service to ask the plaintiffs to clean

or go to Court for an injunction. Plaintiffs agree to remove any waste facilities and refuse at the end of operations. Plaintiffs believe that it is reasonable to do so, however, including specific details on removing refuse in the distant future is an unreasonable waste of time, energy and money.

In addition, plaintiffs agree to regularly remove garbage and solid waste. However, it is unreasonable to require all waste to be "disposed of in approved sanitation landfills within the Nephi Area. In the future, it may become necessary or more cost effective to dispose of the trash in other areas or by other means. Plaintiffs do not wish to be bound be a requirement to dispose of trash by landfill when it is cheaper and better for the environment to dispose of the refuse in another manner. Any remedy for a Forest Service determination that this requirement is not properly met should again be an action in the proper court.

15. **Seasonal Operations.** Plaintiffs believe that this restriction is unreasonable with regard to the Forest Service. Plaintiffs have agreed to limit their operations with the State of Utah in order to reduce the impact to big-game. As stated by the Forest Service in its comments to this paragraph, this is required by the "Utah Division of Wildlife Resources." If necessary, plaintiffs can approach the Utah Division for a variance or even complete removal of the restriction. As big game range areas and herd sizes change, the State restrictions may change. Plaintiffs believe that it is unreasonable to be required to approach the Forest Service regarding this restriction when the reason for the restriction is not within their area of expertise and is handled by another competent government agency.

16. **Removal of Equipment and Improvements.** Plaintiffs agree to remove equipment and improvements from Forest Service lands when no longer necessary. However, in interpreting this section, plaintiffs state that improvements has been defined as "buildings," not changes to the terrain in general. In addition, when the equipment "is no longer necessary" is a determination to be made solely by the owner of the superior estate, the plaintiffs.

17. **Signs.** Plaintiffs will place signs as required by State and Federal regulation. Plaintiffs believe it is unreasonable for the Forest Service to demand signs beyond those required by Federal Mining Safety regulations and state mining regulations. Therefore, plaintiffs expect that the Forest Service would have no interest in placing signs and these restrictions should not be part of the Forest Service permit.

18. **Written Forest Service Reclamation Plan.** Plaintiffs have already provided a reclamation plan to the State of Utah. This plan has been approved by the State and incorporated in the Small Mining Permit held by the plaintiffs. State and Federal regulation detail reclamation requirements. It is unreasonable for the Forest Service to demand reclamation that is in excess of other mines in similar situations. Furthermore, it is unreasonable that plaintiffs be required to receive an approved reclamation plan prior to commencement of operations. This simply puts the

plaintiffs six years away from mining again. The plaintiffs will have a permit, but no ability to mine until the Forest Service subjectively determines what a "detailed" plan is and whether it is sufficient. More importantly, the amount of the surety bond should not be tied in any way to the reclamation plan. The most complete reclamation plan in the world should not change the amount of the reclamation bond. Plaintiffs agree to reclaim the property as required by the proper regulations when it is time to reclaim the property.

19. **Reclamation as soon as practical.** Plaintiffs agree to reclaim property when it is no longer being used for mining purposes in the foreseeable future. Plaintiffs further agree to reclaim as necessary to maintain its small mine status unless and until a large mining plan is filed and approved by the state. The plaintiffs also agree to use a Forest Service seed mixture so long as the mixture is similar or identical in cost and composition as seed mixtures used by the Forest Service in similar situations. Also, plaintiffs agree to seed topsoil that will be in place in excess of three years. Plaintiffs do not agree to allow the Forest Service to unilaterally stop work at the site if it believes reclaimation is not proceeding "as soon as practical." The remedy for the Forest Service is a Court action. In addition, the plaintiffs agree to reclaim according to the state requirements for reclamation.

20. **Reclamation of Wildlife Habitat.** The comments to paragraph 19 of the Forest Service's Proposed Conditions expressly states that this requirement is a part of the state mining permit and is "desired by the Utah Division of Wildlife Resources." Simply put, this requirement should therefore be handled by the appropriate state agency, not the Forest Service. If this requirement is met by the State permit, plaintiffs believe that it is unreasonable to double efforts and the money spent meeting this requirement for the Forest Service would be wasted in a duplicate effort.

21. **Cut and fill slopes.** Plaintiffs believe that it is unreasonable for the Forest Service to have a continuing ability to shut down operations for studies and decision making processes that are not initiated by the plaintiffs. It is therefore unreasonable to allow the Forest Service a right to stop operations while cut slopes are discussed. It is also unreasonable to allow the Forest Service the ability to demand cut slopes which are different from the well established, federal mining regulations. Plaintiffs are willing to keep cut slopes within the parameters set forth in Federal guidelines and regulations. Plaintiffs are also willing to revegetate the cut slopes with seed mixtures that are approved by the Forest Service and are similar in cost and composition to other seed mixtures used in the area.

22. **Stockpiling Topsoil.** Plaintiffs agree to stockpile topsoil and respread the soil where feasible during reclamation.

23. **Timely surface revegetation.** Plaintiffs agree to seed landslide areas where the landslide was directly attributable to mining operations. Again, the plaintiffs are willing to seed with mixtures that are approved by the Forest Service and are similar in cost and composition to other seed mixtures used in the area. If the Forest Service deems that revegetation is not timely or adequate, the remedy is in a Court of law. Also, if plaintiffs dispute the cause of any landslide in the area, the remedy would by in Court.

24. **Seasonal Reclamation.** Plaintiffs object to this requirement and believe that it is unreasonable. Plaintiff sees no benefit in spreading seed over ground after the growing season and then removing it promptly when the growing season starts again. If the Forest Service means that additional drains should be placed on exposed surfaces, the plaintiff also claims that this expense is unreasonable. Plaintiffs' mining surface will be essentially flat. The cut slopes will have been revegetated and the roads need to remain open. In addition, the Forest Service already indicates that other drainage structures will already be in place. Therefore, additional season work beyond routine maintenance and repair would dramatically increase cost on the project making it unreasonable.

25. **Safe reclamation of Disturbed Areas.** Plaintiffs state that this requirement is unreasonable and is simply another ploy by the Forest Service to delay this project. Plaintiffs have an approved reclamation plan. Plaintiffs have agreed herein to additional reclamation requirements. Plaintiffs are bound by Federal law and regulation to have a safe workplace and to leave areas relatively free of chemical contamination. Plaintiffs have no desire to receive a permit to negotiate with the Forest Service for their personal permission to mine the site.

Plaintiffs have further assumed that by failing to include the following in its most recent form of required conditions the forest service is no longer interested in the enforcing them: an engineering structural stability analysis.

After reviewing each of the conditions set forth by the Forest Service, one thing becomes abundantly clear--the Forest Service continues to believe that it can stop mining unless it gets its way on the surface of the mining site. This is wrong. The Forest Service repeatedly states that the plaintiffs "shall," "must," or "will" do the following. The appeal decision from the Forest Service on the ROD expressly states that the Forest Service may "seek to insure" that use is not unreasonable and "may propose alternatives," however, the restrictions are not "binding." The appeal decision further states that "if the owner of the mineral estate can demonstrate that [the restrictions] would unreasonably prohibit recovery of mineral the methods cannot be enforced by the Forest."

For the past year, the plaintiffs have claimed that existing law and regulation amply protects the Forest Service ground. The Forest Service has repeatedly stated that State law regulations were reasonable, yet the Forest Service has continued to assert additional requirements which are still characterized as binding. In fact, no permit has issued with the Forest Service's "reasonable"

conditions even though both sides have been in apparent agreement with regard to the surface use of the property. Plaintiffs have agreed to go far beyond State regulation and law in the requirements agreed to herein in another attempt to placate the Forest Service.

Plaintiffs do not believe that a plan of operations needs be filed under Federal law and regulation. However, if it will allow the issuance of a permit within the next few days, plaintiffs would request a copy of a blank form to so that it may be filled in and immediately returned to the Forest Service. As repeatedly stated herein, additional restrictions are unreasonable. Additional posturing and delay by the Forest Service is also unreasonable. The Forest Service has been clearly aware of the plaintiffs' position for well over a year, yet no legitimate attempt has been made to resolve the disputes. Your April 22, 1996 letter concludes with a demand to "comply with the conditions in the Record of Decision." The ROD simply states that "the Forest Service will issue a special-use permit . . ." subject to binding mitigation measures. The appeal modifies this decision "insofar as conditions for surface use were characterized as binding." Duncan holds that the Forest Service can not prevent mining and that it can ask the mineral estate owner to be reasonable in its use of the surface. We continue to agree to be reasonable, and have again done the work for the Forest Service. Please respond as soon as possible with your legal support for denying the permit and with your response to our statement of reasonable conditions.

Sincerely,

Robert Steele

Troy K. Fitzgerald

cc:

Thomas Tidwell
Wayne Hedberg, DOGM